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No. 84-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHELIN TIRE CORPORATION,
Petitioner

v.

ITCO CORPORATION
and
STATE OF NORTH CAROLINA,
Amicus Curiae

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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I. ITCO MISPERCEIVES THE *RES JUDICATA* ISSUE PRESENTED.

As it did in the Fourth Circuit Court of Appeals, ITCO here attempts to argue that its voluntary dismissal of Sherman Act § 1 causes of action *with* prejudice was in actuality a dismissal *without* prejudice. ITCO quotes portions of the District Court's statements in support of its fallacious argument. In at least one instance, however, ITCO omits a critical part of the District Court's colloquy with counsel to suggest that the Court accepted ITCO's position that the dismissal would be without *res judicata* effect. The entire, unedited, passage reflects the disingenuousness of ITCO's argument. Mr. Brown, representing ITCO, addressed the Court:

> MR. BROWN: Well, Your Honor in that case we will withdraw my motion for dismissal without prejudice and move that it be dismissed with prejudice, again with, hopefully, carefully worded language that preserves to us the full orbit of Chapter 75 liability which would include proof of Section 1 conspiracy—
>
> THE COURT: Well, I stated before on that that I don't see that this dismissal at all has anything to do with the relevancy of any evidence that would have been available to you under your Section 1 claim as against a Chapter 75 claim. *I say, I'm not ruling on it now* but I see nothing to prohibit your going ahead and proving that claim with whatever relevant evidence is available to you.
>
> *The fact that once you would have used the same evidence in support of a different type cause of action I don't think would be held against you.* (omissions emphasized)
>
> MR. BROWN: Your Honor, I think you have stated it quite well and with this on the record I don't think we will have any problem with it, but in case there were some confusion if the case ever gets back to Raleigh, I just wanted to make sure that that didn't become a

> roadblock to some of the kinds of evidence we could produce. (JA 305-306)[1]

ITCO's omission, in its quotation on page 9 of its Brief in Opposition, of the critical phrase "I say, I'm not ruling on it now," and the Court's reference to "a different type cause of action" are critical. The Court's discussion of the evidentiary issue was not an assent to abnormal operation of the rules of *res judicata*.

In response to a question from Michelin's attorney, the Court explained its ruling as follows:

> THE COURT: I will answer it in this fashion. I understand the effect of the plaintiff's motion to dismiss Counts 1 and 2 of the amended complaint with prejudice to mean that this plaintiff does not desire to litigate in this or any other court those two counts again; and that the judgment rendered on his motion allowing it will be *with prejudice and be nonappealable*. But he is reserving his right to bring witnesses here who would have testified to facts which had they been within the context or the ambit of a Section 1 claim would also be relevant on the Chapter 75 claim. And I have told him and you that in my opinion the fact that he takes a dismissal with prejudice on a cause of action does not preclude his use of evidence which would have been favorable to him in that cause of action had it gone to trial.
>
> MR. ALVIS: Put simply, not to litigate those facts applicable to the Sherman Act claims unless they would have been *independently relevant* to Chapter 75.
>
> THE COURT: You don't litigate facts; you litigate causes of action.
>
> MR. ALVIS: Yes, sir.

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[1]References to the Joint Appendix are designated "JA," references to Michelin's Petition for a Writ of Certiorari are designated "Pet.," and references to Appendix materials in Michelin's Petition are designated "Pet. A."

> THE COURT: *He cannot litigate a cause of action on his Section 1 claim after what he's already said in the record.*
>
> And he is nodding his approval of everything I've said, right?
>
> MR. BROWN: *That is correct, Your Honor.* We are not predicating any further action under Section 4 of the Clayton Act which assumes a violation of Section 1 of the Sherman Act. It solely goes to Chapter 75 which may encompass the same or some of the same facts as would constitute a violation of Section 1 but they would be violations of Chapter 75; not an action under Section 4 of the Clayton Act.[2] (JA 307-308) (Emphasis added).

Most important is the Court's statement, with ITCO's assent, that, "He cannot litigate a cause of action on his Section 1 claim after what he's already said in the record." ITCO's counsel stated, "That is correct, Your Honor."

The full exchange between the parties and the Court leaves no doubt that ITCO's claim of a reservation of rights, essentially transforming its dismissal with prejudice into a dismissal without prejudice, was not accepted by the Court. ITCO's request for "hopefully, carefully worded language" (JA 305) was not granted. The Court instead replied that the evidentiary issue of admissible evidence would be determined pursuant to the Federal Rules of Evidence. The discussion had no impact on the usual application of the rules of *res judicata*. As the Court made abundantly clear, ITCO cannot litigate a cause of action on its Section 1 claim.

In his dissent to the Fourth Circuit's opinion, Judge Russell highlighted this exchange between Court and counsel, and wrote:

> I do not read this language of plaintiff's counsel as supporting the conclusion that the plaintiff "dismissed its federal claim on the understanding that whatever

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[2]ITCO partially quotes this exchange at page 22 of its Brief in Opposition.

> antitrust arguments it might have made under the Sherman Act that also are cognizable under the North Carolina Act would remain available in the event of success on appeal and a subsequent trial after remand." What counsel actually said in submitting his motion, as shown in the above quote of his language, was that "hopefully" the order for judgment of dismissal with prejudice would include "language that preserves to us the full orbit of Chapter 75 liability which would include proof of Section 1 conspiracy . . . ." I have also quoted the Court's response to this request. In this response, the Court made it plain that, "I'm not ruling on" whether "this dismissal at all has anything to do with the relevancy of any evidence that would have been available to you under your Section 1 claim as against a Chapter 75 claim." *That language, it would seem, does not justify a finding that there was any "understanding" on the effect of the dismissal; there could have been no such understanding in view of the District Court's categorical statement that he was "not ruling on" that question.* Moreover, when the Court entered its formal judgment, it did not include any "carefully crafted" language that set forth any such understanding or ruling that included "language that preserve[d] to [the plaintiff] the full orbit of Chapter 75 liability . . . ." Under those circumstances the order of judgment granting the motion by the plaintiff to dismiss the federal antitrust action with prejudice gave rise to *res judicata*. (Pet. A-23) (Emphasis added).

A review of the November 29, 1982 proceedings in the District Court can lead to no other conclusion but that Judge Dupree accepted ITCO's dismissal with prejudice, subject to normal operation of the rules of *res judicata*.

At the November 29, 1982 proceedings in the District Court, ITCO initially argued its motion for certification and

immediate appeal under 28 U.S.C. § 1292(b) (JA 275). The Motion was denied by the Court (JA 300).[3] ITCO's counsel then moved for dismissal of the Section 1 claim *without* prejudice (JA 302-303). In ITCO's view, such a dismissal would "reserve again the right to prove a conspiracy that would in fact violate Section 1 which could then be used as a basis for liability under Chapter 75." (JA 302). The Court denied ITCO's motion to dismiss, stating, "Well, I would not dismiss the case without prejudice. That would be simply to allow the 1292 motion in effect and give the plaintiff leave to amend." (JA 305). The motion for dismissal with prejudice followed and was accepted by the Court. The subsequent order of the District Court dismissed the Section 1 Sherman Act claims with prejudice (Pet. A. 26-27). The usual rules of *res judicata* apply to that dismissal.[4]

II. BECAUSE THE FOURTH CIRCUIT BASED ITS HOLDING AS TO ITCO'S UNFAIR TRADE PRACTICE CLAIM SOLELY UPON THE PRESENCE OF A VIABLE SHERMAN ACT § 1 CAUSE OF ACTION, THAT COURT'S CONTINUED RELIANCE ON A STANDARD OF CONSPIRACY PROOF DISCREDITED IN *MONSANTO CO. V. SPRAY-RITE SERVICE CORP.* PRESENTS A SPECIAL AND IMPORTANT REASON FOR REVIEW.

Contrary to ITCO's statement (Brief in Opposition p. 10), the Fourth Circuit Court of Appeals specifically declined to comment on the merits of any of ITCO's theories of recovery

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[3]During the argument on its motion for certification, the issue of the Court's ruling on summary judgment was raised, but, contrary to ITCO's statement (Brief in Opposition p. 8), the District Court did not invite any motion for reconsideration. Indeed, the Court specifically stated it was *not* inviting such a motion. The Court stated, "Well, I am not issuing an invitation for you to do that but it will be interesting to see what the reaction of your adversary is to the same proposition" (JA 291). The District Court did not rule on any motion for reconsideration.

[4]The Fourth Circuit Court of Appeals applied the doctrine of *res judicata* to alternative claims in the single lawsuit in the case of *Bostick Oil Co. v. Michelin Tire Corporation*, 702 F.2d 1207 (1218), n. 22 (1983), cert. denied _____ U.S. _____, 104 S.Ct. 242, as Michelin argued in the Court of Appeals and as discussed by Judge Russell in his dissenting opinion (Pet. A-24).

other than the Sherman Act § 1 conspiracy claim. The Fourth Circuit wrote:

> Without in any way opining upon the merit *vel non* of ITCO's additional theories, we merely note that the presence of a single potentially meritorious theory of recovery is enough to compel a reversal of the judgment below and remand for trial. (A. 13).

The standards announced by this Court in *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464 (1984), are thus central to this case. If the doctrine of *res judicata* does not bar the revival of ITCO's conspiracy-based cause of action, as Michelin asserts, the Fourth Circuit's declaration as to the applicable standard of proof of conspiracy becomes critical.

The conclusion of law by the Fourth Circuit here, still relying upon the now-discredited case of *Bostick Oil Co. v. Michelin Tire Corporation*, 702 F.2d 1207 (4th Cir. 1983), cert. denied ____ U.S. ____, 104 S.Ct. 242, ignores this Court's express reversal of the *Bostick* rule in *Monsanto*, 104 S.Ct. at 1468, fn. 5. The Fourth Circuit held that a Section 1 conspiracy "might be founded upon proof that Michelin's decision to terminate a dealer was made in response to complaints by rival dealers over price competition generated by the terminated dealer." (Pet. A-14) The standard of law cited by the Fourth Circuit is erroneous.

In *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, this Court wrote:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. . . . Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, "arise in the normal course of business and do not indicate concerted action." 104 S.Ct. at 1470.

Even if complaints were sufficient to support an inference of conspiracy, the only comment which ITCO characterizes as a "complaint" was a factually accurate observation by another

equally large Michelin dealer that ITCO's Charlotte location did not offer retail tire services. At page 6 of its Brief in Opposition, ITCO supports its reference to smaller dealers' "complaints directly about ITCO" with some six Joint Appendix references. Every one of those references is to that single observation by a competing large dealer concerning ITCO's non-servicing Charlotte warehouse.[5] The comment confined itself to pointing out that ITCO was ignoring the obligation of its agreement with Michelin to provide retail tire services. Moreover, the memorandum quoted by ITCO (Brief in Opposition, p. 7) is obviously unilateral, the author concluding, "*I* feel that in the long run, *we* would be better off without the large wholesaler such as Bostick . . . ."[6] Michelin personnel stated that, in the usual course of business, all Michelin dealers complain about all other Michelin dealers all the time, a fact of commercial life recognized by the Court in *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, at 1470.

ITCO attempts to bootstrap itself into a viable conspiracy claim by equating complaints about other dealers with complaints about ITCO. Its attempts cannot conceal the fact that there are no price complaints whatsoever about ITCO in this record.

The Fourth Circuit's decision here is in clear conflict with this Court's pronouncements in *Monsanto*. Rule 17.1, Rules of the Supreme Court of the United States.

III. *MONSANTO'S* EFFECT ON ITCO'S NON-CONSPIRACY BASED THEORIES MUST BE RECOGNIZED.

Absent viable proof of conspiracy under the standards announced in *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, ITCO must argue that a manufacturer's unilateral actions with respect to resale pricing run afoul of Section 5 of the Federal

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[5]Similarly, ITCO's record reference (Brief in Opposition p. 5), to complaints about large wholesalers, is in actuality a reference to "out of state" wholesalers. This specifically could *not* include ITCO.

[6]Brief in Opposition, P. 7.

Trade Commission Act and NCGS § 75-1.1.[7] This Court has recently expressed a contrary opinion. In *Monsanto Co. v. Spray-Rite Service Corp., supra*, the Court wrote:

> Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); cf. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960). Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination. 104 S.Ct. at 1469.

This is not a termination case. The dealer agreement expired by its own terms, and a new contract was required if the parties wished to do business in the succeeding year. This fact was central to the District Court's grant of summary judgment on ITCO's unfair trade practice claim (JA 296, 299-300).

The *Colgate* doctrine allows a manufacturer to undertake unilateral actions to limit its product to non-price cutters, to refuse to deal with wholesalers, and to refuse to sell its product through non-servicing distributors. *U.S. v. Colgate & Co., supra*, and *Monsanto Co. v. Spray-Rite Service Corp., supra*, afford no other conclusion.

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[7] As noted by ITCO (Brief in Opposition p. 12), the North Carolina Act is guided by interpretations of the FTC Act. *Johnson v. Phoenix Mutual Life Insurance Company*, 300 N.C. 247, 266 S.E.2d 610 (1980).

CONCLUSION

For these reasons, Petitioner Michelin Tire Corporation respectfully submits the issues presented in its Petition for Writ of Certiorari merit consideration by this honorable Court.

Respectfully submitted,

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